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IN THE

# Supreme Court of the United States

October Term, 1944

No. 234

GRIEDER MACHINE TOOL & DIE COMPANY,
*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petitioner, Grieder Machine Tool & Die Company, prays that a writ of *certiorari* be issued to review the decree of the United States Circuit Court of Appeals for the Sixth Circuit entered on April 13, 1944, directing the enforcement of an order of the National Labor Relations Board.

### Opinions Below

The United States Circuit Court of Appeals for the Sixth Circuit entered judgment on this cause on April 13, 1944. The decision, not yet officially reported, is set out in full at pages 395 to 402 of the record.

The decision and order of the National Labor Relations Board are reported in 49 N. L. R. B. No. 190, and are printed in the record at pages 75 to 80.

## Jurisdiction

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. 347), and under Section 10(e) and (f) of the National Labor Relations Act (29 U. S. C. 160(e) and (f)).

## Statement of the Matter Involved

On May 29, 1943, the National Labor Relations Board entered its Order (R. 75-80) requiring petitioner:

1. To cease and desist from (a) discouraging membership in International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, or any other labor organization, (b) refusing to bargain collectively, and (c) in any other manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act.

2. To reinstate one Henry Clabaugh and make him whole for any loss of pay he may have suffered by reason of his discharge.

3. Upon request, to bargain collectively with the International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, as the exclusive representative of petitioner's employees.

4. To post in its plant notices that petitioner's employees "are free to become or remain members of International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, affiliated with the Con-

gress of Industrial Organizations", and that petitioner will not discriminate against any employee "because of his membership or activity in any such organization".

Petitioner is an Ohio corporation organized in 1941 and located in Bowling Green, Ohio. (R. 94). It is engaged in the manufacture of precision gun and machine tool parts for the United States Army and Navy. (R. 94).

Because the skilled workmen needed for the manufacture of such products cannot in these war years be obtained in a rural community like Bowling Green, petitioner adopted a system of apprentice employment and training. (R. 287, 350). These apprentices were men without previous industrial experience who completed an elementary course in industrial machine operation. (R. 287). Such men were given probationary employment at a starting wage rate of 45¢ an hour and assigned to easily operated machines under close supervision. (R. 291). They were retained for a period long enough to test their ability and desire to develop into useful employees. (R. 291). The apprentice who developed satisfactorily was given wage increases from time to time and his employment finally made permanent. (R. 197). The unsatisfactory trainee received no such wage increases and was discharged at the end of the trial period. (R. 245, 349).

Clabaugh, whom the Board has ordered reinstated, was one of these trainees or apprentices. (R. 114, 275). Clabaugh came to the Grieder factory entirely lacking in experience in machine operation. (R. 118). His employment record demonstrated that he had been found unsatisfactory by his previous employers. (R. 115-120). He was still on W.P.A. in January, 1942. (R. 114). It was under W.P.A. auspices that he first came into the petitioner's plant in February, 1942, to take a four weeks W.P.A. course designed to fit him for a position of novice machine operator. (R. 114). While he took this training at the Grieder plant, he was entirely free of the petitioner's supervision. (R. 114, 278).

Clabaugh was placed on the Grieder pay roll in March, 1942. (R. 114). He was hired not out of charity, but because labor was scarce and skilled workers unavailable. He, like other inexperienced men, was hired with the hope that he would develop into a competent and useful machine operator. (R. 287, 291). He was hired at the beginners' rate of 45¢ an hour, and he was still making that rate at the end of six weeks when he was discharged. (R. 115). Those six weeks are a continuous record of incompetence and misconduct, of indifference to the advice and warnings of supervision, and of fast-mounting realization that Clabaugh was not making good and did not, in fact, desire to do so. Their inevitable culmination was discharge. Following Clabaugh's discharge, he worked for the Toledo Steel about four weeks, and then he drove a truck for a grocery for about three or four weeks. (R. 130). At the time of the hearing in January, 1943, he was a guard at the Willys-Overland. It is quite significant that this man held at least three jobs in the ten months following his discharge by the petitioner. (R. 130-131).

Despite external pressure on the Grieder factory produced by a strict production schedule and work undertaken on a quotation rather than "cost-plus" basis (R. 279, 281), the impossible was not expected of Clabaugh or of any other novice. (R. 245, 291). He was assigned to a simple hand milling operation. (R. 106, 348). He received the benefit of continued supervision and advice. (R. 277). The W.P.A. graduate was not a finished product, nor was he expected to be. (R. 275, 287). He was hired in the hope that he would increase in skill and efficiency. (R. 287). When employees did improve, they were given current wage increases and retained. (R. 197, 291). When it became evident that improvement was improbable, they were released. (R. 349, 351, 352). During the five or six weeks Clabaugh was on the Grieder pay roll, he did not improve and by his own admission he received no increase in pay.

(R. 115). Just as Clabaugh's hiring and treatment were a part of the regular Grieder policy, so also was his discharge. Other trainees of caliber superior to Clabaugh's were released because their work did not merit retention. (R. 245, 291, 351, 352). The fact that Clabaugh belonged to the union certainly should not have made him immune to the consequences of his own incompetency.

It was for that incompetency that Clabaugh was discharged. There is no evidence in the record showing that the Grieder Company was even aware of Clabaugh's union activities. He was not, as others had been, a union member when he began work. (R. 106, 288). His discharge occurred prior to the day on which union buttons were first worn in the Grieder plant. (R. 131, 195). The Board's finding, therefore, presents the case of a man being discharged for union activities when there is absolutely no proof that those activities were known to the employer who discharged him.

The best that can be said for Clabaugh's record in the Grieder plant is that he himself testified he had never been reprimanded for his work—he likewise admitted, however, that he had never been complimented on his work. (R. 108, 109, 124). Clabaugh's testimony in his own favor is not only weak but is also unreliable; Clabaugh perjured himself on the stand on at least two occasions. (R. 126-128, 131; 119-122).

Clabaugh's incompetence and misconduct are established beyond refutation by the testimony of his superiors, by the testimony of other employees in the plant, and by the testimony of his fellow union workers. Clabaugh's discharge slip read: "Late starting work, excessive smoking on job. To (*sic*) much talking and visiting other machine. Do not rehire". (R. 393). Three supervisors of Clabaugh testified at the hearing concerning the reasons for Clabaugh's discharge. They were Superintendent

Strothers, Vice President Dunlap, and President Grieder.

Superintendent Strothers testified that he told Clabaugh many times to cut down on smoking (R. 236); that notwithstanding these warnings Clabaugh continued to smoke constantly, in spite of the fact that the machine he was operating required the use of both hands, and that smoking interfered with his operation of the machine (R. 237, 238); that he warned Clabaugh several times against the practice of constantly visiting other operators and impeding their work (R. 238); that Clabaugh spoiled more work than the average employee (R. 239); that Clabaugh was always late in starting work and was the worst visitor in the plant (R. 245); that Grieder and Dunlap continually complained to him about Clabaugh's derelictions (R. 247, 248); that every time he saw Clabaugh, Clabaugh was either getting a drink or smoking (R. 255); and that Grieder frequently complained about Clabaugh smoking and visiting and told him to let Clabaugh go if he didn't cut out so much smoking and visiting. (R. 246, 247).

President Grieder testified that Clabaugh's work was very poor (R. 275); that he spoke to Strothers about the poor quality of Clabaugh's work (R. 275); that Clabaugh was an excessive smoker (R. 275); that the operation of Clabaugh's machine required the use of both hands (R. 276); that the difference between Clabaugh's smoking and the smoking of other workers was that Clabaugh smoked constantly (R. 276); that Clabaugh was constantly talking with other workers (R. 288); that he was always going over to other machines and bothering other employees (R. 276, 277, 288); that Clabaugh was late getting started in the morning and at noon (R. 278); that Clabaugh had too much scrap (R. 275, 279-281); and that his warnings to Clabaugh went unheeded. (R. 276, 289).

Dunlap testified that every time he had occasion to go into the plant, he saw Clabaugh talking (R. 347, 349);

that Clabaugh was always 10 to 15 minutes late getting started after lunch (R. 347); that other employees who were warned for similar misbehavior mended their ways, but not Clabaugh (R. 349, 350); and that he made out Clabaugh's separation slip a couple of hours after his discharge. (R. 350).

The supervisory judgments of Clabaugh which prompted his discharge were accurate judgments. They were shared by the men who worked by his side on other machines. One employee testified that although he had to tend to his own machine he observed that Clabaugh was smoking constantly and was also talking "off and on". (R. 215). This employee testified that if Clabaugh had not been warned for his misconduct "it was a wonder". (R. 216).

The Board's own witnesses unconsciously collaborated the foregoing testimony. Clabaugh's fellow complainant and co-union worker and organizer testified that he had observed Clabaugh smoking and talking to other workers "at his machine", "at another machine", "at the tool crib", and "all over the plant for that matter". (R. 201, 202). When asked whether this conduct of Clabaugh's had occurred while Clabaugh's machines were in operation, this Board witness, who had already testified that he could observe Clabaugh's work (R. 201), replied that he "wouldn't know". (R. 202). When asked if he had ever seen Clabaugh "loafing around", he "wouldn't say". (R. 202).

The facts above constitute the record upon the discharge which the Board and the United States Circuit Court of Appeals have found was discriminatory.

On July 27, 1942, a consent election was held in petitioner's factory to determine the bargaining representative for petitioner's employees. (R. 90). Three weeks later, the National Labor Relations Board accredited the CIO as such representative. (R. 92). Thereafter, in October and November of 1942, petitioner's representatives and repre-

sentatives of the accredited union met several times and discussed terms for a proposed contract. (R. 178, 181, 322-324). These conferences, conducted in admitted good faith, resulted in petitioner's agreement to the adoption of thirty-nine of the union's proposals, including recognition of the accredited union as the sole bargaining agent for all of petitioner's employees. (R. 174-184, 373-385). The last of these conferences was held on November 16, 1942. (R. 325). On that date, the union representatives refused to bargain further and demanded that petitioner agree immediately to the union's proposals for a closed shop and blanket wage increases. (R. 168, 187, 188, 363, 364). When petitioner requested further discussion, the union representatives broke off the conference and "walked out" of the conference room. (R. 168, 188). Neither the union nor petitioner afterward asked for renewal of negotiations. (R. 189, 213, 332, 366).

On May 29, 1943, after the usual proceedings pursuant to Section 10 of the Act, the National Labor Relations Board entered its decision and order requiring petitioner to bargain collectively upon request, to notify its employees that they may become or remain members of the CIO-affiliated union without fear of discrimination, and to reinstate Henry Clabaugh with back pay. (R. 75-80). On April 13, 1944, the United States Circuit Court of Appeals for the Sixth Circuit, with Judge Simons dissenting in part, affirmed the Board's decision and decreed enforcement of the Board's order. (R. 295-402). Petitioner seeks writ of *certiorari* to review that decision of the Circuit Court of Appeals.

## Questions Presented

1. Can petitioner be required to post notices that its employees may without fear of discrimination become or remain members of *one* particular union?

2. Must an employer initiate renewal of bargaining which has been broken off by the union?

3. Does the unsupported and completely contradicted testimony of a discharged employee constitute substantial evidence that his discharge was discriminatory?

**Reasons Relied On For Allowance Of The Writ**

I. THE ORDER THAT PETITIONER POST NOTICES THAT ITS EMPLOYEES MAY WITHOUT FEAR OF DISCRIMINATION BECOME OR REMAIN MEMBERS OF ONE PARTICULAR UNION IS CONTRARY TO LAW.

In Section 2(d) (3) of its order (R. 79), the Board ordered petitioner to post notices that its employees "are free to become or remain members of the International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, and that petitioner will not discriminate against any employee because of membership or activity in such an organization".

Obviously, the decision of the United States Circuit Court of Appeals for the Sixth Circuit sustaining this portion of the Board's order, is in conflict with the decisions of the United States Circuit Court of Appeals for the Second Circuit in *Westinghouse Electric & Mfg. Co. vs. N. L. R. B.*, 112 F. (2d) 657; *N. L. R. B. vs. Standard Oil Co.*, 138 F. (2d) 885, and *N. L. R. B. vs. Elizabeth Arden, Inc.*, 139 F. (2d) 488, with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in *De Bardeleben et al. vs. N. L. R. B.*, 135 F. (2d) 13, with the decision of the United States Circuit Court of Appeals for the Eighth Circuit in *Cudahy Packing Co. vs. N. L. R. B.*, 102 F. (2d) 745, and with the decision of the United States

Circuit Court of Appeals for the Tenth Circuit in *Colorado F. & I. Corp. vs. N. L. R. B.*, 121 F. (2d) 165. The United States Circuit Courts of Appeals for the Second, Fifth, Eighth, and Tenth Circuits, upon the principal that "the purpose of the Act is to leave the employees with a free choice" and not "subject them to the compulsion of their employer, outside labor union, the Labor Relations Board, or anybody else as to what is their best interest in joining or forming labor organizations" because "the act was not passed, it may not be used for the purpose of forcing the seating of nationally affiliated labor organizations contrary to the real wishes of the employees" (*De Bardeleben et al. vs. N. L. R. B.*, 135 F. (2d) 13, 15), have revised the terms of the notices which employers must post to read that employees are "free to join or not join any labor organization" (*Cudahy Packing Co. vs. N. L. R. B.*, 102 F. (2d) 745).

If the petitioner should ultimately be required to post a notice, the form of that notice will be particularly important because a union not affiliated with the CIO has conducted a membership campaign among petitioner's employees and has petitioned the Board for certification as the accredited bargaining representative. (R. 221-226). The United States Circuit Court of Appeals was aware of the activities of this other union when the court ordered petitioner to post the notice specified by the Board. (R. 399).

This court should decide whether the National Labor Relations Board has the power under these circumstances to order an employer to post a notice that his employees may without discrimination join or become members of one particular union. The decision of this court will resolve the conflict which now exists between the decisions of the various United States Circuit Courts of Appeals.

## II. THE JUDGMENT THAT PETITIONER HAS REFUSED TO BARGAIN COLLECTIVELY SHOULD BE REVIEWED BY THIS COURT.

The decision that petitioner has violated its duty to bargain collectively should be reviewed because it is a decision "probably in conflict with applicable decisions of this court" (Supreme Court Rule 38, par. 5(b)).

The present decision holds that an employer must request renewal of bargaining conferences broken off by employees' representatives. Such a decision is in conflict with the decisions of this court in *N. L. R. B. vs. Columbian Enameling & Stamping Co., Inc.*, 306 U. S. 292, and *N. L. R. B. vs. Sands Manufacturing Company*, 306 U. S. 332, and should be reviewed for that reason.

The United States Circuit Court of Appeals erroneously assumed petitioner's position to be that although petitioner had refused to continue negotiations on November 16, 1942, such refusal was justified by petitioner's receipt of notice that a second union had asked to be certified as the bargaining agent of petitioner's employees. Thus, the court passed over the actual reason for termination of the bargaining between petitioner and the already accredited union with the statement that:

> "* * * We do not go into detail touching the evidence as to what caused the break in negotiations on November 16th. * * *" (R. 398).

The court continued by stating that:

> "* * * It is enough to say that the Union's representatives insisted upon going forward and respondent's contention was that in view of the Regional Director's letter of November 16th it doubted the advisability of further recognizing the status of the Union as bargaining agent. * * *" (R. 398).

The court then declared that an employer's doubts as to the propriety of an established certification do not justify

his refusal to bargain with the certified union and that if petitioner had such doubts, it should have communicated with the Regional Director "as it had been invited to do in the letter of November 13, 1942". (R. 399).

The court clearly misstated the facts. Reference to the letter of November 13, 1942 (R. 387), shows that petitioner was advised only that the petition of the intervening union had been assigned to a Field Examiner who was to communicate with petitioner in the course of his investigation. Nowhere was the petitioner invited to communicate with the Regional Director. Furthermore, what is even more important, the court below improperly appraised the real issue as to this matter. We submit that the fact that the petitioner received notice of another union's intervention is a fact entirely irrelevant to the issue in this case.

The notice of intervention had simply one effect upon the November 16, 1942, bargaining conference between petitioner and the accredited union. Because the notice had arrived immediately prior to the conference, petitioner's representatives asked for a recess to enable them to discuss the significance of the notice. (R. 326). The notice had no other effect. When the twenty-minute recess ended, petitioner's representatives walked back into the conference room and stated that they were ready to continue bargaining. (R. 186, 362). There is no dispute upon this evidence. Nor is there any dispute on the evidence that negotiations were then entered into and continued for a period variously estimated by the union's and petitioner's representatives as between one and two hours. (R. 326, 329, 363). There is no dispute that the negotiations after the recess on November 16 were *bona fide* and resulted in agreement upon such matters as the duration of the prospective contract. (R. 326). There is, finally, no dispute on the record evidence that the last bargaining conference terminated because the union representatives "walked

out" when petitioner's representatives, who had already consented to a large part of the union's demands, were not ready without further discussion to agree to the remainder. (R. 168-170, 188).

There is no escape from these facts. The issue in this case is now and always has been whether an employer must initiate renewal of bargaining broken off because disgruntled union bargainers refused to continue negotiations. The uncontradicted evidence in this case shows that the union representatives became impatient, walked out, filed charges, and never attempted after that to meet with the petitioner. There is absolutely no evidence that the petitioner at any time refused to continue negotiations.

The appellate court's decision upon this issue is contrary to the decisions of this court in *N. L. R. B. vs. Columbian Enameling & Stamping Co., Inc.*, 306 U. S. 292, and *N. L. R. B. vs. Sands Manufacturing Company*, 306 U. S. 332, and should therefore be reviewed by this court.

## III. THE UNSUPPORTED AND COMPLETELY CONTRADICTED TESTIMONY OF CLABAUGH DOES NOT CONSTITUTE SUBSTANTIAL EVIDENCE.

The reinstatement order in this case was entered upon the uncorroborated testimony of the complainant. Every other relevant portion of the record refutes that testimony. As stated by dissenting Judge Simons of the Circuit Court of Appeals:

> "* * * There is cumulative evidence that Clabaugh was a poor workman, wasted his time, and was a destructive influence in the plant, and this quite apart from his union activity. It is true that Clabaugh himself challenged this evidence, but upon this record Clabaugh's evidence, insofar as it is unsupported by other witnesses or reasonable inferences, is not entitled to belief by reasonable men, and so does not rise to the dignity of substantial evidence." (R. 402).

The order of reinstatement means that an employer cannot discharge an active union worker regardless of that worker's incompetence and misconduct. It is an order which directly contradicts this court's decisions in *N. L. R. B. vs. Jones & Laughlin Steel Corporation,* 301 U. S. 1, and *The Associated Press vs. N. L. R. B.,* 301 U. S. 103, that the National Labor Relations Act does not take away the employer's right to discharge an unsatisfactory employee. The petitioner together with every other employer of union labor is entitled to know if the present order is valid. The growth of unionism in this country makes the importance of the issue obvious. Does union activity provide job insurance?

This issue is more than another application of the standard that an order of the Board must be based upon substantial evidence. *Consolidated Edison Company of New York vs. N. L. R. B.,* 305 U. S. 197. The *character* of the evidence in the present case—the discharged employee's own testimony versus the rest of the record—presents the qualitative issue of whether union activity immunizes a worker to discharge. Particularly is this true where the record shows Clabaugh perjured himself on the stand on at least two occasions. (R. 126-128, 131; 119-122). This issue clearly deserves the consideration of this court.

Moreover, the decision here conflicts with the decisions of the United States Circuit Courts of Appeals for the Second and Fifth Circuits. In *Ballston-Stillwater Manufacturing Co. vs. N. L. R. B.,* 98 F. (2d) 758, the Circuit Court of Appeals for the Second Circuit was asked to decide whether the National Labor Relations Board can order a worker reinstated because of his own testimony, contradicted by the testimony of his foreman and fellow workers. That court declared:

> "* * * The inference that Ippoliti was discharged because of her CIO membership instead of her violation of the rule and her habitually poor work is

> too arbitrary to stand. To sustain it on such a record would grant to members of a complaining union absolute immunity from discharge for inefficiency."

In *N. L. R. B. vs. Williamson-Dickie Manufacturing Co.*, 130 F. (2d) 260, the Circuit Court of Appeals for the Fifth Circuit was asked to decide the same question. It declared:

> "'* * * If real grounds for discharging him had not been shown, or if he had been discharged for trivial or fanciful reasons, these facts would have supported an inference that he was discharged for union activity, but when the real facts of the discharge appear, these facts are stripped entirely of probative force. For it is settled by the decisions that membership in a union is not a guarantee against discharge, and that when real grounds for discharge exists, the management may not be prevented, because of union membership, from discharging for them.'"

The facts of the present case call even more clearly than did the facts in the cited case for application of their rule that:

> "'* * * when real grounds for discharge exist, the management may not be prevented, because of union membership, from discharging for them.'"

Therefore, because the decision appealed from both presents an important but unsettled question of federal law and conflicts with the decisions of other Circuit Courts of Appeals, the decision should be reviewed by this court.

## Conclusion

The decision of the court below that petitioner must post notices that its employees are free to become or remain members of *one particular union* is in direct conflict with the decisions of the United States Circuit Courts of

Appeals for the Second, Fifth, Eighth, and Tenth Circuits. Moreover, the court's decision that petitioner has refused to bargain collectively conflicts with this court's decision in *N. L. R. B. vs. Columbian Enameling & Stamping Company, Inc.*, 306 U. S. 292, and *N. L. R. B. vs. Sands Manufacturing Company*, 306 U. S. 332. Finally, the decision that the entirely uncorroborated and completely contradicted testimony of a discharged employee constitutes substantial evidence that his discharge was discriminatory, presents an important and unsettled question of federal law, and is a decision in conflict with the decisions of the United States Circuit Courts of Appeals for the Second and Fifth Circuits in *Ballston-Stillwater Manufacturing Co. vs. N. L. R. B.*, 98 F. (2d) 758, and *N. L. R. B. vs. Williamson-Dickie Manufacturing Co.*, 130 F. (2d) 260.

For these reasons, we submit that this petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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Dated June 29, 1944.